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91-1686

Supreme Court, U.S.
FILED
MAR 9 1992
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CASE NO.: _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1991

BASSEM BOURHAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Counsel for the Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of the Petitioner's motion to dismiss for violation of his Sixth Amendment right to a speedy trial is in direct conflict with Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed 101 (1972).

2. Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's decision to admit testimony in violation of the Petitioner's Sixth Amendment right to confront the witnesses against him is in direct conflict with Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) and Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

LIST OF INTERESTED PARTIES

TRIAL JUDGE	Lenore C. Nesbitt
PETITIONER	Bassem Bourhan
UNITED STATES OF AMERICA	Lynne W. Lamprecht, Assistant United States Attorney
ATTORNEY FOR PETITIONER	Alvin E. Entin, Esq.
ALLEGED VICTIMS	None

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(i) Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of the Petitioner's motion to dismiss for violation of his Sixth Amendment right to a speedy trial is in direct conflict with Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed 101 (1972).

(ii) Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's decision to admit testimony in violation of the Petitioner's Sixth Amendment right to confront the witnesses

against is in direct conflict with Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2431, 65 L.Ed.2d 597 (1980); California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) and Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1025, 13 L.Ed.2d 923 (1965).

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CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BASSEM BOURHAN

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH JUDICIAL CIRCUIT

The Petitioner, BASSEM BOURHAN, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Judgment of the District Court is reprinted herein. (App.1-7). The district court's ruling on the Petitioner's Motion to Dismiss, and its Findings of Fact and Conclusions of Law were made orally. The opinion of the Court of Appeals for the Eleventh Circuit affirming the Judgment of the District Court in United States v. Bourhan, was rendered on December 11, 1991, and is reprinted herein. (App. 8-9). The Mandate issued on January 7, 1992.

JURISDICTION

This petition arose in the first instance from criminal charges filed in the District Court for the Southern District of Florida. The Judgment in a Criminal Case rendered by the Court (App.1-7) was appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to the jurisdiction vested in the Court by 28 U.S.C. 1291.

This court has jurisdiction over this petition pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 804, Federal Rules of Evidence

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Other Exceptions: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it,

including the name and address of the declarant.

STATEMENT OF THE CASE

The Petitioner, BASSEM BOURHAN, was named in a twenty-two (22) count indictment returned by a Federal Grand Jury sitting in Miami, Florida on August 2, 1984. Mr. BOURHAN was charged together with sixteen other individuals with a variety of violations of federal law relating to importation and attempts to import quantities of methaqualone.

Mr. BOURHAN was named in Count 1, 5, 6, 7, 8, 20, and 21 of the indictment. Count 1 charged that this Defendant was a member of a conspiracy to import methaqualone into the United States from Colombia, South America and the Bahamas in violation of Title 21, United States Code, Section 952(a) and Title 18 United States Code, Section 2. Counts 6, 20, and 21 charged Mr. BOURHAN with separate attempts

to import methaqualone into the United States from Colombia, South America and the Bahamas in violation of Title 21, United States Code, Section 963 and Title 18, United States Code, Section 2. All of the aforementioned violations were alleged to have occurred during the period from December, 1980 through October 1981.

The evidence presented at trial related to a series of meetings and trips as part of various efforts to import quantities of methaqualone into the United States. Government witness, Wilbur Jackson testified that he met Mr. BOURHAN in or about December, 1980 and shortly thereafter flew with him from the Tamiami airport to Bimini, Bahamas and then the following day to Colombia, South America. After arriving at a grass strip in Colombia, the plane was refueled and loaded with approximately thirty-two to forty (32-40) boxes of quaaludes each

weighing approximately fifty (50) pounds. The aircraft then returned to Bimini where the boxes were unloaded, taken to the docks and loaded into three (3) vessels for the trip to Miami.

Mr. Jackson then testified that in January, 1981, this Defendant again flew to Colombia to pick up more pills but upon his return to the Bahamas, he was arrested by the Bahamian defense force. Later that month the Defendant returned to Colombia where the plane was again loaded, returned to Bimini and was off-loaded. Another government witness, Johnny Crump, testified that in October, 1981, Mr. BOURHAN flew to Colombia a last time to pick up another load of quaaludes but when he arrived the pills were being replaced by marijuana. Mr. BOURHAN refused to have anything to do with marijuana and had no further involvement with the charged conspirators.

While the indictment was ordered sealed at the time of its return, it remained so for only five days. it was unsealed on August 7, 1984 at the time of the arrest of the first of the codefendants. From the date the indictment was returned until the date of the Petitioner's arrest, some five and one half years later, the United States Government made no effort whatsoever to locate and bring to trial the Petitioner, BASSEM BOURHAN.

When the Petitioner's trial began on July 17, 1990, his trial counsel moved to dismiss the indictment against him on the ground that he had been denied his right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. That motion was denied by the trial court.

Thereafter, during the course of the presentation of the government's case in

chief, the prosecutor learned that one of the witnesses she intended to call had become unavailable. As a result, the government sought to introduce the testimony of that witness from the trial of some of the codefendants which had occurred several years earlier, at a point in time prior to the arrest of the Petitioner, when he was not represented by counsel and at a proceeding where none of the involved parties had any interest or motivation to protect this Petitioner's rights. Trial counsel for the Petitioner objected to the introduction of this prior testimony, since it violated the Petitioner's right to confront the witnesses against him as provided by the Sixth Amendment to the United States Constitution. That objection was overruled by the trial court and the prior testimony was received in evidence.

After the presentation of all of the

evidence, the jury retired to deliberate and on July 24, 1990, they returned a verdict finding the Petitioner, BASSEM BOURHAN, guilty of each count of the indictment in which he was named. Thereafter, on September 25, 1990, the trial court sentenced BASSEM BOURHAN to serve a fifteen (15) year term of imprisonment followed by a four (4) year special parole term.

The Petitioner timely filed his Notice of Appeal on October 2, 1990. The opinion of the Court of Appeals for the Eleventh Circuit, affirming the judgment of the District Court, was rendered on December 11, 1991 (App. 3) and on January 7, 1992, the mandate issued.

REASONS FOR GRANTING THE WRIT

(i) The Sixth Amendment to the United States Constitution guarantees the Defendant the right to speedy trial. This protection afforded all Defendants in a

criminal prosecution is activated when the Defendant is indicted. United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Thus, from the moment when the Government chooses to charge a Defendant with a criminal violation, it inherently undertakes the obligation to make at least a reasonably diligent effort to bring the Defendant to trial. "A Defendant has no duty to bring himself to trial; the State has that duty as well as the duty to insuring that the trial is consistent with due process." Barker v. Wingo, 407 U.S. 514, 527, 92 S.Ct. 2182, 33 L.Ed.2d 101, 115 (1972).

Barker, supra, is, without question, the leading case and controlling precedent with regard to a Defendant's constitutional right to a speedy trial. In that case, this Supreme Court recognized that the very nature of the right to a speedy trial made it impossible

to establish with precision a time period within which a Defendant's right had been protected and beyond which infringement occurred. The Court thereby created a balancing test and listed four factors which it felt were appropriate to consider in an analysis of whether a Defendant's Sixth Amendment rights had been abridged.

"Length of delay, the reason for the delay, the Defendant's assertion of his right, and prejudice to the Defendant" Barker, supra., at 407 U.S. 530 are among the factors are appropriate for consideration in attempting to resolve an issue such as that presented herein. None of these four factors, in an of itself, is either sufficient or necessary and each case must be analyzed on its own particular facts. Burkett v. Cunningham, 826 F.2d 1208 (3rd Cir. 1987).

Under the circumstances presented herein, it is clear that BOURHAN's speedy

trial rights have been infringed. The length of delay from the return of the indictment on August 7, 1984, until the Petitioner's arrest on February 7, 1990, was an unconscionably long five and one half years. An additional five months passed before trial commenced on July 17, 1990.

During a pre-trial hearing held on May 16, 1990, it became clear that for approximately two (2) years prior to the return of the indictment in this case the Petitioner BOURHAN had been a cooperating witness in a criminal investigation then being conducted in Martin County, Florida. During the same time period, on at least one occasion, BOURHAN left the United States and returned to his homeland.

Thereafter, in 1984, the Defendant was asked by the State Attorney's Office in Martin County to return to the United States as a potential witness in an

upcoming trial. BOURHAN complied with that request and when that trial was concluded he returned to his homeland. Thereafter, the Petitioner was not contacted, in any way, by anyone, from the Federal or State prosecuting agencies to advise him of the return of a Federal indictment against him. His arrest on February 7, 1990 was a mere happenstance wholly unrelated to any efforts by the United States to bring him before the Court to face these charges. In fact, as the record clearly demonstrated, the United States Government made no effort whatsoever during the five and one-half years this indictment was pending to locate the Petitioner. This, despite the fact that his location was known to the government and, by the exercise of even a modicum of effort and due diligence the United States could readily have located the Petitioner and protected his right to

be brought to trial in a timely fashion.

At the time of the arrest of one of the codefendants in 1984, a wall handing was seized. This item was turned over to the Petitioner's trial counsel approximately ten (10) days before his trial in 1991. It contained BOURHAN's name, telephone number and then current location. The Government made absolutely no effort to follow up on this information or on any of the several other sources of information which would readily have led to Petitioner's being located and his rights being protected. A simple check through the Government's various computer systems and indexing records would have readily revealed that Special Agent Carter Osleber of the Drug Enforcement Administration, West Palm Beach, was a member of the task force operating in Martin County with which the Petitioner was cooperating. Since the state

authorities had no problem bringing Mr. **BOURHAN** back to the United States to testify, it is reasonable to assume that had the United States Attorney's Office, or its investigating agencies, exerted even this slight degree of effort, the Petitioner would easily have been located and brought to trial at a point in time when his right to a speedy trial could have meaningfully been assured.

Further, a check in the N.C.I.C. computerized records would have led the Government straight to Martin County and the state prosecutors, who had demonstrated the ability to readily contact the Petitioner at a point in time immediately surrounding the date this indictment was returned. Even this minimal effort was not made.

Contact with the Immigration and Naturalization Service would have readily revealed valuable information pinpointing

the Defendant's location. When BOURHAN returned to the United States to testify in 1984, Assistant State Attorney Daniel Morgan initiated the process that led to the Petitioner receiving a visa to return to the United States from Kuwait. Even the most cursory review of the I.N.S. records would have revealed that visa and the accompanying information concerning the Petitioner's location.

The totality of the effort to locate BOURHAN was a single meeting with his wife and his parents who told the Government that he had returned to Kuwait or Syria.

Still,armed with this information,the Government did absolutely nothing. Not only did the Government not initiate extradition proceedings against the Petitioner, but they didn't even try to find out if he could have been extradited.

In Strunk v. United States, 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d (1973),

this Court found that a delay of ten months from indictment to arraignment violated the requirements of the Sixth Amendment. Obviously, a delay of over six times as long as that in Strunk, is reprehensible and mandates vindication of the Defendant's rights by a dismissal of the charges.

There should be no mistake. The Petitioner does not contend that he is entitled to the relief sought because the Government could not locate him. The Petitioner does not argue that the subjects of an indictment should be rewarded for being able to avoid capture. It is not the failure to locate the Defendant which violated his Sixth Amendment rights but rather the absence of diligent efforts to find him which infringed upon his rights. The Government's failure in this regard also effectively prevented the Defendant from

asserting his right to a speedy trial. This right could not be asserted by a Defendant who the Government made no effort to locate, despite numerous readily available avenues for finding and alerting him to the pending charges.

The Government's failure, as aforesaid, substantially prejudiced this Petitioner's right to a fair trial and effectively denied him due process. Their refusal to make a reasonable effort to bring him to trial at a time reasonably near the date on which he was charged, prevented him from being tried together with others similarly charged and raising defenses inherently available only in a joint trial. Further, by making no effort to locate this Defendant, the Government obtained the tactical advantage of trying those Defendants against whom it had a strong case, and thereafter negotiating cooperation agreements with them and

others to be used at the time when BOURHAN was located. The Government cannot be permitted to gain such an advantage over a Defendant by failing to diligently perform its obligation to bring a Defendant to trial at the earliest possible moment.

The prejudice imposed upon Mr. BOURHAN by the Government's failure to do its duty is made most clear by the Government's offer, and the trial court's acceptance, of the prior testimony of a witness the Government claimed had become unavailable. Thus, by denying the Defendant his right to a speedy trial the Government was also able to deny him the right to confront the witnesses against him. It is clear that the impact of the Government's failure to exercise due diligence resulted in substantial prejudice to Mr. BOURHAN and denied him a fair trial.

Balancing all of the factors

suggested by this Court's opinion in Barker v. Wingo, supra, together with the ease by which the Government could have avoided this inexcusable delay, makes it clear that the Petitioner has been denied his right to a speedy trial. Dismissal is, and must remain, the only possible remedy and is the only relief that will vindicate this Defendant's constitutional rights. Strunk v. United States, supra.

(ii) The right of a Defendant to be confronted with the witnesses against him has long been recognized as one of the most cherished rights exercised by an individual charged with a crime. "The right of confrontation is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). "The right of confrontation is basically a trial right. It includes

both the opportunity to cross examine and the occasion for the jury to weigh the demeanor of the witness." Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 91968). "One of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to access the credibility of the witness." Berger v. California, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969). It is through this right of confrontation and cross examination that the jury must evaluate the credibility of the evidence presented.

Obviously, the right of confrontation is not all encompassing since such an interpretation would require all hearsay statements to be declared unconstitutional and inadmissible. As announced by this Court in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970):

> While it may readily be conceded that hearsay rules and the

> confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the confrontation clause is nothing more or less than a codification of the rules of hearsay and the exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

The question raised herein is the interrelationship between the Defendant's right of confrontation guaranteed by the Sixth Amendment to the United States Constitution and the Federal Rules of Evidence, Rule 804(b)(5). That evidentiary rule provides for the admission of a hearing statement if it is shown to be:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness if the court determines that (A) the statement is offered as evidence

> of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

In this case, the Government offered, over objection, and the Court received and permitted to be read to the jury, testimony of a Bahamian customs inspector, Rudolph Cunningham. This testimony was given by the witness at the trial of several codefendants in 1985. At that time the Petitioner was not a party to the action because the Government had chosen to make no attempts to locate him. Further, no attorney who participated in the cross examination of this witness was acting on behalf of BOURHAN or had any interest in attempting to protect his interests and rights.

The testimony of Mr. Cunningham

related to the arrest of the Petitioner in the Bahamas on January 10, 1981, the fact that methaqualone was not classified as a dangerous drug in the Bahamas at the time of his arrest and the witness' contention that at the time of BOURHAN's arrest there was no market for quaaludes in the Bahamas. This testimony was not appropriately admitted under Rule 804(b)(5), since the arrest of the Petitioner in the Bahamas was not a fact material to the charges he faced. The fact of his arrest was, at best, corroborative of a collateral fact testified to by one of the Government's informants and, at worst, wholly irrelevant and immaterial to the issues appropriately to be decided by the jury. The Petitioner was not charged with bringing quaaludes into the Bahamas but rather with attempting to bring them into the United States. Thus, the testimony in

question clearly does not qualify under Rule 804 because it did not relate to a material fact.

Additionally, none of the aforementioned testimony could be found to be more probative than other evidence which the Government could have procured through reasonable effort. With respect to the Defendant's arrest, that fact had already been proven by the testimony of the Government's witness, Wilbur Jackson and was not being contested by the defense. The legal classification of methaqualone at the time of the Defendant's arrest and the existence or non-existence of a market for that drug in the Bahamas, if material, could have been testified to by any one of the vast array of Bahamian and/or American officials and agents with knowledge of the subject matter equal to or greater than that of Mr. Cunningham.

The introduction of this prior testimony runs completely contrary to the interests of justice. It prevented the Petitioner from availing himself of the opportunity to cross examine this witness and confront the only testimony which arguably contradicted his defense that he was not a participant in a conspiracy to import methaqualone into the United States, but, rather, believed he was not violating any law because he refused to bring drugs of any kind into the United States.

The testimony offered at trial showed unequivocally that BOURHAN refused to bring drugs, such as marijuana, into the Bahamas in violation of that country's laws.

He even refused to bring drugs, in particular, marijuana, out of Colombia. The United States government denied the Petitioner an opportunity to confront this

crucial witness at the trial of his codefendants in 1985. That infringement of his rights was compounded by denying him the opportunity to rigorously cross examine this witness with the assistance of any attorney dedicated to vindicating his rights and aware of the defense he desired to present to the jury selected to decide his fate.

The protection provided to the Defendant by the Confrontation Clause of the Sixth Amendment to the United States Constitution was intended "to protect the integrity and reliability of the trial mechanism." Dasher v. Stripling, 685 F.2d 385 (11th Cir. 1982). The right to confront the witnesses against a Defendant is of little value if it does not assure that the Defendant has the means to effectively test the evidence against him. Ohio v. Roberts, 448 U.S. 56, 100, S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). The

suggestion that the witness had been cross examined at the time he testified and that should be good enough to protect the Petitioner's rights is absurd. The rights protected by the Sixth Amendment are individual rights and can only be protected by aggressive examination by the Defendant through an attorney aware of his defense strategy and dedicated to vindicating that Defendant's rights. United States v. Amaya, 533 F.2d 188, 190 (5th Cir. 1976), cert denied 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed.2d 551 (1977). The introduction of the testimony of Mr. Cunningham gives during a prior trial in which BOURHAN was not a participant, violated rights guaranteed to him by the Sixth Amendment and requires that his conviction be reversed.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be

granted.

Respectfully Submitted,

ALVIN E. ENTIN, ESQUIRE
Entin, Schwartz & Margules
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

PROOF OF SERVICE

COMES NOW, Alvin E. Entin, Esq., on behalf of the Petitioner, BASSEM BOURHAN, and states to this Court:

1) That on March , 1992, the attached Writ of Certiorari submitted on behalf of the Petitioner was mailed at the United States Post Office, Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Petition for Writ of Certiorari has been furnished to Kenneth W. Starr, Solicitor General of the United States, 10th and Constitution, N.W., Washington, D.C. 20530.

3) Said statement is being submitted

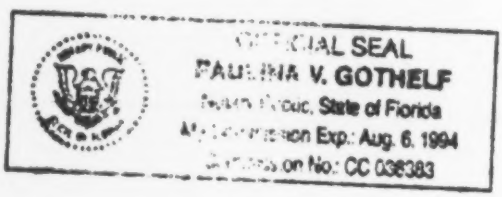
to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

ALVIN E. ENTIN, ESQUIRE
Entin, Schwartz & Margules
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

SWORN TO AND SUBSCRIBED before me this 5th day of March, 1992.

NOTARY PUBLIC, STATE OF FLORIDA

My commission expires:



CASE NO.: _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1991

BASSEM BOURHAN

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-502-CR-NESBITT

UNITED STATES OF AMERICA,

Plaintiff,

v.

BASSEM BOURHAN,

Defendant.

_____/

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT ENTERED A PLEA OF:

Not guilty to count(s) 1, 6, 20, 21, 5, 7, 8

THERE WAS A:

Verdict of guilty as to counts(s) 1, 6, 20, 21, 5, 7, 8

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

Conspiracy to import methaqualone and marijuana 21:963 as to Count I. Importation of methaqualone 21:952(a) as to Counts 5, 6, and 8. Attempted importation of methaqualone, 21:963 as to Counts 6, 20 and 21.

IT IS THE JUDGMENT OF THIS COURT THAT:

As to Count I the Defendant is hereby committed to the custody of the Attorney General, or his authorized representative for imprisonment for a term of five (5) years. IT IS FURTHER ORDERED that as to Counts 6, 20 and 21 the Defendant is hereby committed to the custody of the Attorney General, or his authorized representative for imprisonment for a term of five (5) years, with said sentence to run concurrently with each other. IT IS FURTHER ORDERED that as to each of Counts 5, 7 and 8 the Defendant is hereby committed to the custody of the Attorney General, or his authorized representative for imprisonment for a term of five (5) years, with said sentences to run concurrently with each other. IT IS FURTHER ORDERED that the Defendant serve a special parole as to Counts 6, 20 and 21 shall run consecutively to Count I and

that the sentences imposed to Counts 5, 7 and 8 shall run consecutively to the sentences imposed as to Counts 6, 20 and 21.

TOTAL SENTENCE: Fifteen (15) years imprisonment, four (4) years special parole.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the Defendant shall:

1. Refrain from violations of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

2. Associate only with law-abiding persons and maintain reasonable hours;

3. Work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability, (When out to work notify your probation officer at once, and consult him prior to job changes);

4. Not leave the judicial district without permission of the probation officer;

5. Notify your probation officer immediately of any changes in your place of residence;

6. Follow the probation officer's instructions and report as directed.

The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $_____ pursuant to Title 18, U.S.C. Section 3013 for Count(s) _____ as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion to the United States.

IT IS FURTHER ORDERED that the Defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the Defendant shall immediately notify the United States Attorney for this district of any change name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this

judgment to the United States Marshal of this district.

The Court orders confinement to the custody of the Attorney General and recommends:

September 24, 1991
Date of Imposition of Sentence

_____
Signature of Judicial Officer

Lenore C. Nesbitt, U.S. District Judge
Name and Title of Judicial Officer

9/25/90
Date

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____ the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-5846

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BASSEM BOURHAN a/k/a SAM,

Defendant-Appellants.

Appeal from the United States District for the Southern District of Florida

BEFORE: FAY, ANDERSON and DUBINA, Circuit Judges.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit

Rule 34-3;

ON CONSIDERATION WHEREOF, it is not hereby ordered and adjudged by this Court that the judgment of convictions of the said District Court in this cause be and the same is hereby AFFIRMED.

ENTERED: December 11, 1991

FOR THE COURT: Miguel J. Cortez, Clerk

By: /S/ Karen McNabb
Deputy Clerk

ISSUE AS MANDATE: January 7, 1992

(2)

No. 91-1686

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1991

BASSEM BOURHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the delay between petitioner's indictment and arrest violated his Sixth Amendment right to a speedy trial.

2. Whether the admission at petitioner's trial of testimony given at a prior trial violated the Confrontation Clause of the Sixth Amendment.

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OPINION BELOW

The order of the court of appeals (Pet. App. 8-9) is unreported, but the judgment is noted at 951 F.2d 367 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1991. The petition for a writ of certiorari was filed on March 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to import methaqualone and marijuana into the United States, in violation of 21 U.S.C. 963; importing methaqualone, in violation of 21 U.S.C. 952(a); and attempting to import methaqualone, in violation of 21 U.S.C. 963. Petitioner was sentenced to 15 years' imprisonment, to be followed by a special parole term of four years. The court of appeals affirmed.

1. During 1980 and 1981, petitioner, a pilot, flew planeloads of methaqualone from Colombia to the Bahamas. Upon arriving in the Bahamas, petitioner and his co-conspirators transferred the contraband to a boat for shipment to Miami. Petitioner was paid as much as $45,000 per shipment. Petitioner also flew his co-conspirators back and forth between Miami and the Bahamas. The purpose of some of those trips was to make payments to Bahamian officials who permitted the conspirators to use the islands as a transfer point. See Gov't C.A. Br. 3-13.

Petitioner was indicted in August 1984. The government did not immediately apprehend him, although it took several steps to locate him. First, it entered petitioner's name in the El Paso Information Center (EPIC) computer system, the Treasury Enforcement Communication System (TECS), and the National Crime Information Center (NCIC) computer systems. In December 1984, the government interviewed petitioner's wife and her parents regarding his whereabouts, and advised them of the indictment. Although they told the government agents that petitioner was in Kuwait or Syria, the government was unable to verify that information. Eventually, it became clear that petitioner left the United States in January 1983 and did not return until

1987, when he entered without being detected. Petitioner finally was arrested on February 7, 1990, when radar picked up his plane entering the United States from the direction of the Bahamas.* See Gov't C.A. Br. 18-21, 24-25.

2. Petitioner moved to dismiss the indictment, arguing that the government's delay in apprehending him deprived him of his right to a speedy trial. The district court denied the motion based on its finding that the government had done all that it could have done to find petitioner from the time of his indictment in August of 1984 until it apprehended petitioner in 1990. See Gov't C.A. Br. 24-26.

Before trial, the government filed a motion in limine to introduce certain prior testimony of Inspector Rudolph Cunningham of the Royal Bahamian Police. In 1985, at the trial of petitioner's co-defendants, Inspector Cunningham had testified (1) that there was no market for quaaludes (methaqualone) in the Bahamas; (2) that petitioner was arrested in the Bahamas in 1981; and (3) that methaqualone was classified as a dangerous drug in the Bahamas at the time of petitioner's offenses. The government explained that it had attempted to secure Cunningham's presence at trial but had failed because he was beyond the subpoena power of the United States. See Gov't C.A. Br. 35, 37.

In response to inquiry by the court, petitioner explained that he was not contending that the testimony had insufficient guarantees of trustworthiness, but only that the statements were immaterial and hearsay. Also,

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* At the time of his arrest, petitioner was carrying four separate passports with overlapping expiration dates, one of which, issued two months after the indictment, contained an altered spelling of petitioner's name. See Gov't C.A. Br. 19.

he indicated that his challenge extended only to that portion of the testimony regarding the existence of a market for methaqualone in the Bahamas in the early 1980's. The district court found that Cunningham was unavailable under Fed. R. Evid. 804(a)(5), overruled petitioner's objection, and allowed the government to introduce Cunningham's prior testimony. See Gov't C.A. Br. 35-37.

3. The court of appeals affirmed petitioner's conviction without opinion. Pet. App. 8-9.

ARGUMENT

1. Petitioner first contends (Pet. 10-21) that the delay between the return of the indictment in August 1984 and his arrest in February 1990 violated his right to a speedy trial, arguing (Pet. 19) that "the Government made no effort to locate [him], despite numerous readily available avenues for finding and alerting him to the pending charges." Because the district court found that the government did all that it could to locate him after the indictment was returned, this challenge in substance is a challenge to the district court's factual findings, which the court of appeals did not overturn. This is not a proper subject for this Court's review. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985).

Petitioner first asserts (Pet. 13-14) that the government should have known his whereabouts while he was cooperating with Florida authorities in a criminal investigation in Martin County. That investigation, however, concluded before the indictment was returned; until the indictment was returned, petitioner's Sixth Amendment speedy trial right had not attached. See *United States* v. *Marion*, 404 U.S. 307, 313-325 (1971). After the indictment was returned, it is undisputed that petitioner was out of the country for three years; that in December 1984 the government had informed petitioner's wife of the

pending charges but was unable to ascertain petitioner's location; that the government entered petitioner's name in the various law enforcement computers; that petitioner had multiple passports and had varied the spelling of his name; and that petitioner had evaded detection upon reentering the United States. In these circumstances, the government was not required to take additional steps to locate petitioner. Even if the government could have done more, that is not sufficient in itself to establish a violation of the constitutional right to a speedy trial. See *Barker* v. *Wingo*, 407 U.S. 514, 531 (1972) (negligence is only a neutral factor in determining a constitutional speedy trial claim).

Other factors also weigh against petitioner's speedy trial claim. For instance, although it is undisputed that the government advised petitioner's family of the indictment in 1984, and that petitioner was aware that the government had contacted his family, petitioner did not assert his right to a speedy trial until the government apprehended him years later. The courts were permitted to give the absence of a demand "strong evidentiary weight in determining whether [petitioner was] deprived of the right" to a speedy trial. *Barker* v. *Wingo*, 407 U.S. at 531-532; see *United States* v. *Loud Hawk*, 474 U.S. 302, 314-315 (1986).

Further, petitioner's speedy trial claim must fail because he was not prejudiced by the delay. Petitioner complains (Pet. 19) that the delay prevented him from being tried with his co-defendants in 1985. But petitioner's own actions, not any government misconduct, caused the separate trials. In any event, joint trials in many cases benefit the government rather than the defendant. See, *e.g.*, *United States* v. *Buljubasic*, 808 F.2d 1260, 1263 (7th Cir.) (discussing ways in which joint trials benefit the government and in some cases prejudice defendants), cert. denied, 484 U.S. 815 (1987). Petitioner does not

explain how he would have benefited from a joint trial with his eight co-defendants. See *United States* v. *Leavitt*, 878 F.2d 1329 (11th Cir.), cert. denied, 493 U.S. 968 (1989) (affirming convictions of petitioner's eight co-defendants). Accordingly, this contention is inadequate to establish prejudice.

Petitioner also argues (Pet. 20) that the delay cost him the opportunity to cross-examine Inspector Cunningham, who became unavailable after the 1985 trial. But Cunningham was cross-examined at the first trial by petitioner's co-defendants, who had the same motives for impeaching his testimony. Petitioner has not suggested any way in which he would have discredited this witness where the others failed. In short, none of the factors identified in this Court's decisions as bearing on a speedy trial claim favors dismissal here.

Finally, this case is not affected by this Court's recent decision in *Doggett* v. *United States*, No. 90-857 (June 24, 1992). To be sure, both cases involve pre-arrest delays caused by the government's inability to locate the defendants after they left the country. This case, however, differs significantly from *Doggett*, because the district court in this case found that the government did everything it could have done to locate petitioner, and because petitioner acknowledged that he knew the government had contacted his family soon after the indictment was issued. As the Court stated in *Doggett*, "if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail." Slip op. 9. Under this standard, petitioner's claim must fail as well.

2. Petitioner also contends (Pet. 21-29) that the admission of Inspector Cunningham's prior testimony after petitioner conceded that the testimony was trustworthy violated his rights under the Confrontation Clause. That Clause guarantees that "[i]n all criminal

prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." In *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990), this Court reaffirmed the rule that an out-of-court statement made by an unavailable declarant may be admitted into evidence without infringing the defendant's confrontation rights if the statement possesses sufficient indicia of reliability to justify dispensing with cross-examination of the declarant. *Id.* at 3147; see *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Reliability concerns are satisfied, without more, if the statement fits within a firmly rooted hearsay exception. *Wright*, 110 S. Ct. at 3147; *Bourjaily* v. *United States*, 483 U.S. 171, 182-183 (1987). If the statement does not fit within such an exception, it may be admitted if it has "particularized guarantees of trustworthiness." *Wright*, 110 S. Ct. at 3149. Because petitioner did not dispute the trustworthiness of Inspector Cunningham's prior testimony in the district court, he cannot now argue that its admission offended the Constitution.

Nor does petitioner fare better in arguing (Pet. 23-26) that the testimony was improperly admitted under Federal Rule of Evidence 804(b)(5). That Rule allows the introduction of the prior statement of an unavailable witness only if the statement is, *inter alia*, "offered as evidence of a material fact [and is] * * * more probative on [this] point * * * than any other evidence that can [be] procure[d] through reasonable efforts." Petitioner argues (Pet. 25) that the inspector's testimony regarding his 1981 arrest in the Bahamas was not material to the drug trafficking charges. Petitioner, however, did not object to that portion of the prior testimony in the district court (see Gov't C.A. Br. 36), and therefore he cannot properly raise that claim in this Court. In any event, the testimony was material, because it tended to show that petitioner had flown a shipment of quaaludes into the Bahamas. To be sure, the indictment

charged importation into the United States, not the Bahamas, but it alleged more specifically that the shipments into the United States were brought through the Bahamas. See, *e.g.*, Count 2, ¶ 3 ("It was further a part of the conspiracy that * * * BASSEM BOURHAN * * * would fly shipments of methaqualone intended for importation into the United States from Colombia, South America, to the Bahamas."). Similarly, Cunningham's testimony regarding the lack of a market in the Bahamas for the quaaludes was material because it tended to show that the drugs were destined for the United States.

Petitioner also complains (Pet. 26) that the government could have obtained the same evidence from a "vast array" of other Bahamian officials. But petitioner did not object on that ground in the district court (see Gov't C.A. Br. 38-39), and therefore he cannot press that argument here. In any event, Cunningham's position as the leader of a law enforcement task force for a chain of several Bahamian islands during the relevant time period, and his experience in this case, made him especially qualified to offer credible testimony regarding the existence of a market for methaqualone in the Bahamas. Moreover, the record reflects that the government attempted with no success to secure other Bahamian witnesses to testify at petitioner's trial in place of Cunningham. See Gov't C.A. Br. 41-42. Accordingly, the district court properly exercised its discretion in allowing the government to introduce Cunningham's prior testimony at petitioner's trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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